



The Battles that Remain:

Military Service and LGBT Equality

By Katie Miller and Andrew Cray | September 20, 2013

As recently as three years ago, gay, lesbian, and bisexual Americans in the armed forces were forced to keep their sexuality a secret or risk being discharged—a risk that would become a certainty if attempting to marry a person of the same sex. Therefore, the idea of extending military spousal benefits to same-sex spouses was inconceivable.

Fortunately, lesbian, gay, bisexual, and transgender, or LGBT, Americans have experienced historic progress over the past three years. In 2010, Congress repealed the discriminatory “Don’t Ask, Don’t Tell” policy, or DADT, which prevented gay, lesbian, and bisexual service members from serving openly and with honesty. And just this past summer, the Supreme Court struck down Section 3 of the Defense of Marriage Act, or DOMA, which forced the federal government to deny more than 1,000 federal benefits and protections to legally married same-sex couples that were freely available to different-sex couples.

So today, sexual orientation is no longer grounds for dismissal from the military, and the federal government—including the Department of Defense—now recognizes same-sex spouses for the purpose of federal benefits. However, the repeal of DADT and the Supreme Court’s decision on DOMA do not mean the end of discrimination for the LGBT Americans who serve in our nation’s military. It is unclear if gay and lesbian veterans will receive spousal benefits if they do not reside in a state that recognizes same-sex marriage; conservatives are attempting to make it easier for service members to harass gay and lesbian troops by establishing broad exemptions for the religious views of service members; transgender Americans are still prohibited from serving in any capacity; and some veterans who were kicked out for being gay or lesbian are still fighting for a discharge upgrade, which affects their ability to gain health care coverage and find employment.

The mission for full equality in the military is incomplete. Here are other major issue areas where LGBT Americans continue to face discrimination in our nation’s armed forces.

'Religious liberty' and sexual orientation discrimination

The Don't Ask, Don't Tell Repeal Act of 2010 was a monumental piece of legislation for our military and for gay and lesbian service members, but the bill did not firmly put an end to discrimination for LGBT members of our military. Earlier versions of legislation to repeal Don't Ask, Don't Tell not only struck down the 1993 law but also called for a policy of nondiscrimination on the basis of sexual orientation in the military to replace it;¹ the bill that Congress passed and that President Barack Obama signed into law included no such language.² As a result, LGBT service members are not a protected class under the military's Equal Opportunity policy, which protects service members from discrimination, harassment, and retaliation on the basis of race, color, sex, national origin, and religion, and creates a clear pathway for recourse outside of the chain of command. Instead, LGBT service members have been instructed report harassment and abuse to their chain of command or to file a complaint with the inspector general.³ This, however, does not trigger the same data collection process that an Equal Opportunity complaint would incite, so the Department of Defense currently does not collect any data on sexual orientation discrimination.⁴

Advocates' failure to secure these nondiscrimination protections by other means is not the only problem that remains after DADT's repeal. Opponents of equality are also trying to make it easier for service members to harass gay and lesbian troops by establishing broad exemptions for the religious views of service members. This year, for example, the House of Representatives voted to include an amendment by Rep. John Fleming (R-LA) into the fiscal year 2014 National Defense Authorization Act, or NDAA, that would "accommodate the beliefs, actions, and speech" of service members except "in cases of military necessity."⁵ Essentially, service members could not be punished for any discriminatory language or conduct—such as harassing gay service members because they view homosexuality as immoral—as long as they are acting out of religious belief. Former Rep. Todd Akin (R-MO) introduced a similar proposal last year, but only a watered-down version was incorporated into the FY 2013 NDAA.⁶

Unsurprisingly, the Pentagon has resisted such legislation, stating that current law already grants "reasonable accommodation" of religious freedom to service members.⁷ Furthermore, the White House pointed out that the amendment would actually tie the hands of commanders, who have the ultimate responsibility of ensuring good order, discipline, and unit morale and who would be helpless to stop religious bullying under the amendment.⁸ Make no mistake: Since the successful repeal of "Don't Ask, Don't Tell," opponents of LGBT equality have made considerable efforts to undermine the military's steady march toward inclusion and respect.

Marriage recognition and access to marriage

Until this summer, the Defense of Marriage Act prevented the military from extending benefits programs to the same-sex spouses of service members and veterans. As a result, same-sex spouses were denied nearly 100 military benefits that were freely available to different-sex spouses, including health care, housing allowances, and survivor benefits.⁹

Then on June 26, 2013, the Supreme Court struck down Section 3 of the law, clearing the way for the military to include same-sex spouses in benefits programs for the first time in our nation's history, and on September 3, 2013, the Department of Defense began extending these benefits.¹⁰ Service members who were married before the Supreme Court ruling will receive entitlements retroactive to June 26, and those who marry in the future may start drawing benefits on the date of their marriage, just like their heterosexual counterparts.¹¹

Moreover, gay and lesbian service members will be eligible to receive federal spousal benefits through the military even if they are stationed in a state that does not recognize their marriages. Currently, only 13 states and the District of Columbia grant the freedom to marry to same-sex couples, but the U.S. military has installations all across the country.¹² The military has authorized commanders to grant up to seven days of leave for stateside couples and 10 days of leave for couples overseas so they can travel to a state in America and legally wed.¹³ Although travelling to a state with marriage equality imposes a significant financial expense for military families—especially for junior enlisted members and those stationed outside the continental United States—the military's willingness to accommodate the marriage of same-sex couples despite disparate state laws is a significant step toward equality for all service members.

The situation for veterans seeking benefits for a same-sex spouse is less clear. In an August 2013 letter to Congress, Secretary of Veterans Affairs Eric Shinseki expressed concerns about a separate statute governing veterans benefits, which legally prevented the department from extending these benefits to the same-sex spouse of a veteran. Less than a week after that announcement, a federal judge in California overturned the statute, which arguably created a legal pathway for the Department of Veterans Affairs to recognize same-sex spouses. Then on September 5, 2013, the Department of Justice announced that it would no longer enforce the law that restricted veteran spousal benefits to different-sex couples.¹⁴

Though the Department of Veterans Affairs now finds it lawful to extend veterans benefits to same-sex spouses, another factor complicates the situation. Though the Department of Defense has decided it will judge the validity of marriages based on where a couple was married instead of where the military member is currently stationed, it is uncertain whether or not the Department of Veterans Affairs will do the same. For example, if a veteran was married in Maryland, a state that recognizes same-sex marriage,

then moves to Virginia, a state that does not recognize same-sex marriage, that veteran could lose all of his or her spousal benefits. Until the Department of Veterans Affairs issues guidance on the implementation of DOMA repeal, it remains unclear whether veterans in same-sex marriages will be eligible for federal benefits if they reside in a state that does not recognize their marriage.

Less than Honorable discharges

Most service members who were discharged for “homosexual conduct” under Don’t Ask, Don’t Tell received Honorable or General Under Honorable discharges. However, before 1993, service members who were found to have engaged in homosexual conduct were likely to receive discharges that were Less than Honorable.¹⁵ A Less than Honorable discharge characterization can have severe consequences that follow a veteran for his or her entire life. In most states, it is legal for private employers to discriminate on the basis of discharge characterization, and a Less than Honorable discharge all but disqualifies a person from working in the public sector.¹⁶ Additionally, a Less than Honorable Discharge characterization may mean forfeiture of veterans benefits, such as G.I. Bill education benefits and health care coverage.¹⁷

Moreover, some discharge paperwork makes note of a service member’s sexual orientation, which marks veterans for possible discrimination on the basis of their sexual orientation in areas such as private employment. After all, it is legal in 29 states to fire an employee or refuse to hire someone simply because of their sexual orientation.¹⁸

Currently, all veterans seeking discharge upgrades undergo a lengthy review process and the likelihood of actually obtaining an upgrade is low. Additional paperwork is needed for discharges that took place more than 15 years ago, so LGBT veterans discharged before the implementation of Don’t Ask, Don’t Tell in 1993 face additional hurdles.¹⁹ Advocates have called the current process “cumbersome and bureaucratic” and have noted that it could take several years for LGBT veterans to receive a response from the review board.²⁰

Veterans’ health

Even before the repeal of Don’t Ask, Don’t Tell, the Department of Veterans Affairs launched initiatives to ensure that LGBT veterans have access to the health care and coverage they need. In 2011, the Veterans Health Administration, or VHA, released a groundbreaking policy statement on the provision of care to transgender veterans. VHA Directive 2011-024 established a policy for the Department about the respectful delivery of care to transgender veterans.²¹ Directive 2011-024 affirmed VHA’s zero-tolerance policy for harassment, required respectful treatment of veterans according to their self-identified gender, and clearly stated that nonsurgical transition-related care is available to transgender patients under the VA’s medical benefits package.²² A second directive renewed these policies in 2013 and extends through February 2018.²³

In February 2012, the Department of Veterans Affairs extended similar protections to lesbian, gay, and bisexual veterans. A department-wide memorandum required that all VA medical centers adopt nondiscrimination and visitation policies protecting the rights of veterans, regardless of sexual orientation or gender identity.²⁴

The VA has complemented these policy directives with guidelines for implementing LGBT-inclusive care in local VA health care facilities. The Veterans Health Administration provides clinical competency training for VHA physicians to ensure that transgender veterans receive high-quality, comprehensive health care.²⁵ VHA medical providers are given additional guidance on meeting the medical needs of transgender veterans through medical guidance on the use of hormone therapy.²⁶ This kind of training and use of clinical standards is particularly significant because medical providers are often given insufficient training in medical school on the provision of care to transgender patients.²⁷ VA medical centers have been quick to adopt these changes, and LGBT special emphasis groups may assist many of them in increasing cultural competency and conducting outreach to LGBT veterans.

These significant advances in LGBT-inclusive health care have been noted by the Human Rights Campaign's 2013 Healthcare Equality Index. Eighty percent of VHA facilities nationwide participated in the index, and of those, more than three-quarters were awarded "Leader in LGBT Healthcare Equality" status.²⁸

Despite these strides toward inclusive health care, outdated regulations continue to prevent some veterans from accessing medically necessary care. Regulations governing the VA medical benefits package prohibit transgender veterans from accessing "gender alterations,"²⁹ which the VHA has interpreted to mean that the benefits package available to veterans does not include transition-related surgical care.³⁰ This kind of exclusion targeting transgender veterans lacks basis in medical science³¹ or even cost savings.³² As such, despite significant policy advances made by the Department, transgender veterans continue to be denied medically necessary care because of arbitrary and outdated policy.

Sodomy clauses

Despite the demise of DADT and a 2003 Supreme Court ruling that struck down sodomy laws across the country, the military maintains sodomy as a criminal offense.³³ Article 125 of the Uniform Code of Military Justice, or UCMJ, states that any person who "engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy."³⁴ Under this language, the intimate relationships of all gay and lesbian service members, including married couples, is a violation of military law.

Legal experts and Pentagon officials alike have stated that the law is basically unenforceable as it applies to consensual sexual relations of gay and lesbian couples.³⁵ However, conservatives have spun efforts to strike Article 125 from the UCMJ as a push by liberals to legalize bestiality.³⁶ This has been a popular argument among conservatives opposing LGBT equality in the past, having described same-sex marriage, for example, as a slippery slope leading to bestiality, interspecies marriage, incest, and pedophilia.³⁷

Lawmakers' attempts to remove the language have fallen short. Nevertheless, the criminalization of intimacy among same-sex couples in the same breath as the criminalization of bestiality is stigmatizing, degrading, and discriminatory to the service members we trust to defend this country.

Transgender military service

Transgender Americans can and do serve in our nation's military. In fact, they serve at a rate double that of the general population.³⁸ However, the repeal of Don't Ask, Don't Tell did not lift the ban on transgender Americans serving in the U.S. military, who must keep their gender identity a secret while they are members of the armed forces. Transgender status and related medical diagnoses immediately disqualify an applicant from joining the service and, for actively serving military personnel, are cause for dismissal. The Army, for example, lists gender identity disorder alongside voyeurism, exhibitionism, paraphilia, and even factitious disorders as a "disorder of impulse control" that warrants an administrative discharge.³⁹

And though the physical and mental demands of military service are unique and complex, and there are hundreds of conditions that can render an individual unfit for service, potential service members can generally request medical waivers to allow them to enter and to continue their service in the military. To date, advocacy groups are not aware of a single waiver being granted to a possible recruit who is transgender on the basis of gender identity disorder.⁴⁰

The distinction remains, despite the fact that gender identity disorder was renamed as gender dysphoria and separated from Dysfunctions and Paraphilic Disorders in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, largely to remove the connotation that transgender people are "disordered." The American Psychiatric Association stated the change was intended not only to better reflect the experiences of transgender people, but also to ensure that the term would not be used against them in "social, occupational, or legal areas."⁴¹ In other words, medical professionals realize that transgender Americans are subject to discrimination based on the common misunderstanding that they are mentally ill or sexually deviant because of their transgender status. According to its medical regulations, the military erroneously follows this line of reasoning.

HIV

Americans with HIV are not eligible for enlistment in the armed forces, and current military members are tested at least every two years. Members of the National Guard and Reserve components of the military who test positive for HIV while serving are generally separated, but those on active duty undergo a medical evaluation to determine if they are fit to remain in the military.⁴²

These active-duty service members are subject to a number of conditions. For example, HIV-positive service members are restricted to assignments within the United States. They cannot be assigned to deployable units because they are strictly prohibited from deploying overseas.⁴³ The result is that these military members are funneled into some of the most undesirable positions in the service and do not receive the overseas experience necessary to compete for promotions. Whereas some policies regarding HIV-positive service members are likely necessary to ensure the well-being of the force—such as preventing HIV-positive personnel from deploying to combat zones—the military has also begun to recognize that some of its policies are more rooted in prejudice than medical knowledge. By its own accord, the U.S. Navy recently updated its assignment policy for HIV-positive service members—stating that the previous policy “made this subset of personnel less competitive in achieving career milestones or warrior qualifications”—as part of a process to ensure that its policies “reflect current knowledge” of HIV.⁴⁴ The Army, Air Force, Marine Corps, and Coast Guard have yet to issue similar guidance or to reiterate the necessity of existing regulations.

Additionally, the military issues “safe sex” orders to personnel with HIV, informing them that they will be criminally prosecuted if they fail to disclose their status to sexual partners or engage in unprotected sex.⁴⁵ Though similar laws are in effect in 32 states, the 2010 National HIV/AIDS Strategy issued by the White House called on states to review policies related to HIV criminalization.⁴⁶ Some research suggests that HIV laws are actually a deterrent to getting tested and seeking treatment, and it is necessary to evaluate these laws for their effectiveness, or lack thereof.⁴⁷ Thus, it is possible that the military’s safe sex orders are counterproductive to the military’s efforts to prevent the transmission of HIV.

Policy recommendations

Congress should pass the Charlie Morgan Military Spouses Equal Treatment Act

The Charlie Morgan Military Spouses Equal Treatment Act would expand federal benefits to all legally married same-sex spouses of service members and veterans. Sen. Jeanne Shaheen (D-NH) introduced the bill in the Senate, and Rep. Adam Smith (D-WA) introduced the bill in the House of Representatives earlier this year.

The bill is named after Army National Guard Chief Warrant Officer Charlie Morgan, who passed away in February after a battle with breast cancer. At the time of her death, Morgan's wife and daughter were not eligible for certain survivor benefits because DOMA prevented the military from recognizing her marriage.

Originally, the Charlie Morgan Military Spouses Equal Treatment Act was intended to offer an exception to military families while DOMA remained the law of the land. But even after the Supreme Court decision, the Charlie Morgan Military Spouses Equal Treatment Act remains necessary. Until the Department of Veterans Affairs issues guidance on the implementation of DOMA repeal, it remains unclear whether veterans in same-sex marriages will be eligible for federal benefits if they reside in a state that does not recognize their marriage.

Because of this problem, Department of Veterans Affairs should follow the precedent set by the Department of Defense and recognize the marriages of same-sex couples based on the state they were married, not the state in which they reside. In the event that the Department of Veterans Affairs fails to recognize the legally valid marriages of same-sex couples in non-marriage-equality states, it will be imperative that Congress pass the Charlie Morgan Military Spouses Equal Treatment Act so that the families of all service members and veterans are honored and compensated appropriately.

Unfortunately, the Charlie Morgan Military Spouses Equal Treatment Act cannot alleviate the financial burden placed on service members who must travel to a marriage equality state in order to wed. Until the Supreme Court establishes a fundamental right to marriage, regardless of sexual orientation, states will be allowed to continue discriminating against same-sex couples who hope to get married.

[Congress should pass the Restore Honor to Service Members Act](#)

As stated above, many veterans received discharges other than “honorable” because of their sexual orientation, which often means they cannot receive federal benefits for their military service and they may have trouble finding employment because of that classification.

The Restore Honor to Service Members Act, introduced by Reps. Mark Pocan (D-WI) and Charlie Rangel (D-NY) in the House of Representatives earlier this year, would set up a process within the Department of Defense to review the records of service members discharged due to sexual orientation and upgrade Less than Honorable discharges to Honorable.⁴⁸ The bill would also remove all indications of a veteran's sexual orientation from the record so gay service members are not “outed” when applying for jobs.

Broadly, the bill streamlines and expedites the process of upgrading discharges based on sexual orientation so veterans can receive the honor and benefits due to them in exchange for their military service.

[President Obama should sign an executive order banning discrimination on the basis of sexual orientation in the U.S. armed forces](#)

Despite the military swiftly and effectively implementing the repeal of Don't Ask, Don't Tell, conservatives are continually paving the way for service members to harass gay and lesbian troops by establishing broad exemptions for the religious views of service members.

Advocates have called on President Obama to issue an executive order that would prohibit discrimination on the basis of sexual orientation in the U.S. armed forces. Such a measure has precedent; President Harry S. Truman issued an executive order in 1948 that desegregated troops, banned racial discrimination in the military, and established an equal opportunity program.⁴⁹ The current program has been expanded to provide recourse for service members facing discrimination on the basis of race, color, national origin, religion, and gender, and could easily incorporate sexual orientation as well.⁵⁰

In the event that advocates cannot secure an executive order from President Obama, it is imperative that members of Congress remove the Fleming Amendment from the FY 2014 National Defense Authorization Act. This would merely preserve the status quo for gay and lesbian service members but it would actively prevent opponents from giving individual service members a license to discriminate and tying the hands of commanders who wish to prevent such conduct.

[Congress should remove consensual sodomy as an offense](#)

The Senate version of the 2014 NDAA bill includes a provision authored by Sen. Mark Udall (D-CO) that would remove the offense of consensual sodomy from Article 125 of the Uniform Code of Military Justice.⁵¹ The proposal maintains forcible sodomy and bestiality as punishable offenses, but simply decriminalizes consensual sexual activity of gay and lesbian service members.

The current version of the Restore Honor to Service Members Act also includes a provision that would remove consensual sodomy from Article 125.

Though the military's ban on consensual sodomy is arguably unenforceable since the repeal of Don't Ask, Don't Tell, many view the law as a relic of the military's history of discrimination against gay and lesbian service members, as it appears in the same sentence with bestiality in the UCMJ.

Revisit medical regulations

Veterans' health

Comprehensive improvements in clinical and cultural competency among VHA providers will benefit many veterans, but full equality requires that medical benefits be made available to the families of LGBT service members and veterans. The Charlie Morgan Military Spouses Equal Treatment Act would make health benefits available to these spouses. Equal treatment of same-sex couples requires adoption of parity in benefits for these couples, regardless of the state in which they reside, and access to health benefits is of the utmost importance in ensuring access to comprehensive, high-quality health care for these families.

The Department of Veterans Affairs should also continue to expand the scope of their LGBT-inclusive clinical and cultural competency initiatives. Ongoing clinical competency trainings are key in ensuring the provision of high-quality care to transgender veterans, and cultural competency trainings and inclusive language guides in development by VHA will help to ensure full implementation of the Department's exemplary policies on the treatment of LGBT veterans.⁵²

Finally, full and comprehensive care requires that transgender veterans be provided parity in access to medically necessary services related to gender transition. Removing the regulatory exclusion on transition-related surgeries and bringing the coverage provided by the benefits package in line with current accepted medical practice are imperative in providing fair coverage for the transgender veterans.

HIV criminalization

Reps. Barbara Lee (D-CA) and Ileana Ros-Lehtinen (R-FL) introduced an amendment to the National Defense Authorization Act that would require the Department of Defense to review its policies on HIV prosecutions. The amendment calls for the Pentagon to issue a report 180 days after the FY 2011 NDAA is passed to demonstrate that HIV-related prosecutions are based on medically accurate understanding of the infection and treatment. It would also require the military to make recommendations for improving the regulations. In May, Reps. Lee and Ros-Lehtinen introduced a similar bill in the House, the REPEAL HIV Discrimination Act of 2013, which would require a similar review of federal and state laws.⁵³

As the Navy has done, the other branches of the U.S. military should also review HIV-positive personnel policy to ensure that each regulation is efficacious and based on a legitimate military readiness interest, not prejudice and misinformation.

Transgender service

Unlike DADT, the ban on transgender service is embedded in military medical policy, not federal statute, so it does not take an act of Congress to lift the blanket ban on transgender Americans joining and serving in the military. Similar to HIV policy, the military should revisit its policy on transgender service to ensure that each regulation is based on the most medically up-to-date research and not stigma and misunderstanding. Recent changes to the Diagnostic and Statistical Manual of Mental Disorders elicit an update to military medical regulations for enlistment and retention, so the branches should review their respective policies so they are no longer unnecessarily discriminating against the transgender Americans who wish to serve or already wear the uniform.

Conclusion

LGBT equality in the military is not just an issue of fairness; it is also about facing the reality that LGBT Americans serve in uniform and make sacrifices on our behalf, just like their heterosexual counterparts. It is the explicit duty of members of Congress and the commander-in-chief to support our military and to ensure that the men and women in uniform are able to perform to the best of their abilities. So while some conservative members of Congress have been wasting time attempting to roll back progress on the repeal of “Don’t Ask, Don’t Tell” and inserting frivolous language into the FY 2014 National Defense Authorization Act—the single-most critical bill to ensuring the functioning of our nation’s military—they could have been focusing on funding the programs that preserve our security and support the troops. It is time that lawmakers lead, follow, or get out of the way when it comes to caring for our troops and achieving LGBT equality in the military.

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